The Old . . . . . The New

The Kentucky Commentator

University of Kentucky College of Law

LEXINGTON, KENTUCKY | A PUBLICATION OF THE STUDENT BAR ASSOCIATION | Vol. 2, No. 2 | NOV.-DEC., 1967

The Kentucky Sedition Case Reviewed

A REPORT ON McSURELY v. RATLIFF
By ROBERT ALLEN SEDLER
Associate Professor of Law

In **McSurely v. Ratliff,** a federal three-judge court declared unconstitutional the Kentucky law relating to "teaching sedition," KRS 432.040. The effect of the decision was also to render unenforceable the other Kentucky laws on "subversion," namely the "criminal syndicalism" law, KRS 432.020, and the "sedition" law, KRS 432.030. The court found that KRS 432.040 was "void on its face" as an overbroad regulation of freedom of expression. It further found that the federal government had pre-empted the field of subversive activity so that a prosecution for overthrow of a state or county government could not be maintained under a state statute. This makes the other Kentucky "subversive" laws a dead letter and insures that any prosecution for "subversion" will have to be brought by federal officials in the federal courts and under federal law. The Kentucky Civil Liberties Union appeared in the case as **amicus curiae,** and it was my privilege to represent the KCLU.

The suit arose out of the arrests of three anti-poverty workers in Pike County, following a midnight raid on their homes. Alan and Margaret McSurely are field workers for the Southern Conference Educational Fund in Pike County, and Joe Mulloy is a field worker for the Appalachian Volunteers there. Mulloy was active in aiding local residents in their efforts to resist strip-mining of their land, particularly Mr. Jinks Ray, whose case received national attention and who was ultimately successful.

Bible "Confiscated"

The raids were led by Mr. Thomas Ratliff, Commonwealth's Attorney of Pike County, and the Republican candidate for Lieutenant-Governor, and the raiding party included the sheriff and deputy sheriffs. The raiding party removed a great deal of "written material" from the plaintiff's homes, which was described by Mr. Ratliff as a "communistic library out of this world." The "haul" included works such as Great Russian Short Stories, the Bible, the Village Voice, the plaintiffs' bank statements and a personal diary, as well as a great many books about socialist thought and philosophy. Parenthetically, it may be noted that many of these books are also "displayed" at the University of Kentucky library and other libraries throughout the state.

The arrests took place on August 11. On August 13, suit was filed in the United States District Court for the Eastern District of Kentucky to enjoin the prosecutions in the state court. The suit was based on **Dombrowski v. Fister.** The plaintiffs alleged that the statute was unconstitutional on its face and that the prosecutions were for the purpose of interfering with the plaintiffs' rights of free expression. The plaintiffs were represented by Dan Jack Combs, a Pikeville lawyer, and William Kunstler, a nationally-known civil rights lawyer, who is a member of the ACLU board.

A three-judge court was convened, consisting of Judges Bert Combs of the United States Court of Appeals for the Sixth Circuit, Judge Bernard Moynahan of the United States District Court for the Eastern District of Kentucky, and Judge James Gordon of the United States District Court for the Western District of Kentucky. The court heard argument on September 1, and at that time I made a presentation based on the history of sedition in Kentucky. The court ordered the submission of briefs, and Mr. Ratliff assured the court that he would take no further action while the case was pending.

Braden Also Indicted

Notwithstanding the assurances of Mr. Ratliff, Judge Stephenson of the Pike Circuit Court directed the September grand jury to consider the charges against the McSurelys and Mulloy. On September 11, the day that I filed the amicus curiae brief for the KCLU, the grand jury indicted the McSurelys and Mulloy on the charge of "teaching sedition" under KRS 432.040. For good measure, they also indicted Carl Braden, the executive director of SCEF, and his wife Anne, on the same charge. Mrs. Braden had never been in Pike County, and Mr. Braden had been there only once or twice. The attorneys for the plaintiffs immediately sought a temporary restraining order against further proceedings, and the court scheduled a hearing for September 14.

The evidence at that hearing was directed primarily to the question of the temporary restraining order. However, that hearing demonstrated just what a sedition trial would be like. Mr. Ratliff, in his cross-examination of witnesses, asked questions such as "Did you see Stokely Carmichael in Nashville the night before riots started there," "Are you a communist," "Is Das Kapital a communist book?" And more of the same. At the conclusion of the hearing, the court recessed, and when it returned, to the surprise of all, it rendered a final decision.

Statute Struck Down

The court held that the case was a proper one for the intervention of the federal court and that KRS 432.040 was "on its face, overbroad, so vague and of such sweeping application as to run afoul of the provisions of the Constitution, which requires narrow and specific regulation in the field of activity protected by the First Amendment." The court further held that state statutes had been pre-empted by the Smith Act, so that the effect of the decision is to prevent a prosecution against "subversives" for "criminal syndicalism" under KRS 432.020 or "sedition" under KRS 432.030. It, therefore, enjoined all prosecutions against the plaintiffs under the statute. Judge Moynahan dissented solely on the ground that the federal courts should not have enjoined the state prosecution. Mr. Ratliff has announced that he plans to appeal the decision to the Supreme Court, but if he does, there is little doubt that the decision will be affirmed.

The statutes in question were all passed in 1920 and have been continued through subsequent compilations with practically no change. They are incredibly overbroad and vague. This is understandable, since they were passed during the time of the "Red scare" and before a law of free speech had been fashioned by the Supreme Court. In part I of the KCLU brief, I traced the legislative and judicial history of the statute. There has never been a valid conviction under the statute.

Braden Conviction Reversed

In 1941 the federal court enjoined a prosecution brought against Jehovahs' Witnesses in Harlan on the ground that their activity could not constitute "sedition." Carl Braden was convicted for sedition in 1954, but this was reversed by the Kentucky Court of Appeals on the ground that the indictment charged sedition against the United States and the Commonwealth, and that such prosecutions had been superseded by the Smith Act. The decision of the court in **McSurely v. Ratliff,** makes it clear that there can be no such thing as "sedition" against a state which does not somehow involve the federal interest as well. Thus all prosecutions for "sedition" under state laws are pre-empted.

Continued On Page 4

Practicing Lexington Lawyer Discusses LSD (of ABA)

By HERBERT D. SLEDD

It has been my pleasure for the past two years to serve as a member of the Board of Governors of the American Bar Association. During this same period, the ABA has been considered the Amendment Association before they graduate from law school, before they take the Bar examination, and before they are admitted to practice. The House of Delegates of the Association, on recommendation of the Board of Governors, took the appropriate steps at the Annual Meeting in Honolulu in August of 1967, and the Law Student Division has now replaced the American Law Student Association, which had been sponsored by the American Bar Association since 1949 as an independent but affiliated organization.

Studied By Special Committee

The special committee considering this important step was chaired by Earl F. Morris, now the American Bar Association President. The committee, the Board of Governors, and the House of Delegates, by American Law Student Association during its 19 year history justified a radical departure from the organizational concept of the American Bar Association to include special provision for membership by law students, believing that they should take a proprietary interest in the largest Association of lawyers in the free world. Two practical reasons sustained the action:

(1) The American Bar Association was convinced that law students, in their professional development, should be exposed to the planning and activities of the practicing Bar.

(2) The profession was faced with complex problems and needed the counsel and participation of law students and recent law graduates.

Any law student in good standing, attending a law school approved by the American Bar Association, is eligible to apply for law student membership at the nominal cost of $3.00 per year. He may automatically become a member of the Association as soon as he is admitted to the Bar without additional application and reduced membership dues during his first year of membership. Law Student Division membership representatives are being appointed in each approved law school to facilitate enrollment of law student members in the American Bar Association. Among the benefits of membership are a subscription to the American Bar News, an informative monthly newsletter; a subscription to the Student Lawyer Journal, published monthly during the school year; and a reduced subscription rate of $1.50 per year for the American Bar Association Journal.

Other Benefits

Other benefits include law student members' eligibility to participate in ABA meetings, institutes, and low cost insurance programs created especially to meet the needs of the young professional.

The Law Student Division will have two representatives as members of the ABA House of Delegates and will thereby be able to participate in the formulation of the official policy of the Association.

Recognizing the need of cooperation between the student and practicing Bar, it is my sincere hope that each qualified law student will take advantage of the opportunity for membership in the American Bar Association.

The PRESIDENT'S Corner

The Social Committee, under the leadership of A. C. Litton, is to be congratulated for staging an outstanding Barristers' Ball. An unusually large number of students attended and several members of the faculty joined us in the festivities. We were also pleased that many alumni were able to attend. From the comments that I heard, I believe that a good time was had by all. One third year student, Orson Oliver, was particularly fortunate. He was the lucky winner of a magnum of champagne in the raffle sponsored by the Law Wives.

The Student Bar Association owes a real debt of gratitude to the Law Wives for their assistance and support of this year's Barristers' Ball. Patty Wheeler, the President of that organization, gave unselfishly of her time and ingenuity. The other Law Wives designed posters and decorated for the grand affair, and we appreciate the efforts of these ladies.

Gordon Finley and his committee have done an excellent job in preparing and conducting the freshman mock exam. The program was designed to prepare first year students for their first law school examinations, and this committee's efforts toward that goal are commendable.

A primary concern of the Student Bar Association this year has been the placement program at the College of Law. Clyde Richardson and I met with Dean Mathews and expressed our concern. As always, the Dean was interested, and we were in agreement on many points concerning improvement of the program. The Student Bar Association Placement Committee is conducting a study of placement programs at other law schools, and we hope to present a proposal for improvement of the program at U.K. before our term of office comes to a close.

This is the last issue of the Commentator this semester. To those third year students who are graduating in December, I extend my kindest personal regards and best wishes for your success in the practice of law. I look forward to meeting you in the courtroom, and to seeing you again at meeting of the practicing Bar.

The editorial board of this year's Kentucky Law Journal is composed of the following. From left to right: Charles Simmons, David Emerson, Steve Bashear and Joe Campbell. Seated is editor Tom Hindes. Absent when the picture was taken was Carl Timothy Cone.

Law Journal Works On Appeals Review Issue

By TIM CONE

Under the direction of Editor-in-Chief Tom Hindes and Comment Editor Joe Bill Campbell, the **Kentucky Law Journal** staff is putting the finishing touches on the 1966-67 Court of Appeals Review. The issue containing the Review should be available about February 1.

Fifth Annual Review

This is the fifth annual Review produced by the Journal. However, the approach has been changed this year. In the past, all cases have been reported in digest form. But due to the rapid increase in the number of cases decided by the Court, this method is no longer feasible. Of the approximately 640 opinions handed down by the Court during the past year, about 30 percent of these were selected, by means of an analytical elimination process, for in depth treatment.

The approach to these cases is similar to that given decisions which were the subjects of case comments, a separate section of the **Journal** in past issues. Because of the expanded scope of the Court of Appeals Review, recent cases will no longer be treated individually.

"This is our most important single project of the year," according to Hindes. "Everyone on the staff seems to recognize this and is putting forth a special effort."

The issue containing the Review is the second of four to be put out by this year's members. The first issue, which appeared early in December, has articles by Professors Roy Moreland and Robert Sedler, representing two points of view on the conflicts of law controversy surrounding the recent Kentucky case, **Wessling v. Paris.** Also in the first issue is a note written by four students, which is an exhaustive study of open housing, entitled "Open Housing Meets My Old Kentucky Home: A Study of Open Housing with Special Attention to Implications for Kentucky."

Upcoming Articles

Other articles of special importance that will appear in the future discuss: planning and zoning; the Negro and fair employment; the invasion of privacy tort. In addition, student notes will also be published on a variety of topics, such as consumer credit insurance and the Sunday Closing Law in Kentucky.

Hindes said that aside from the changed format of the Court of Appeals Review, there are no major **Journal** policy changes planned. "We intend to continue the general policies of the past, with an attempt to improve them. The major change made last year was the candidacy program for the selection of new members. It worked reasonably well, considering that it was new, and we hope to improve it."

In addition to Hindes and Campbell, the Editorial Board for 1967-68 is comprised of Charles Simons-Associate Editor, Tim Cone-Lead Articles Editor, Steve Beshear-Note Editor, and David Emerson-Managing Editor.

Moot Court Team Goes To N.Y.

The University's moot court team composed of Kathy Fitzgerald, Steve Bashear and Maynard Shryver won the regional championship at Kansas City, Mo. and will advance to the finals in New York. The finals will be held in December.

In the next issue of the Commentator we will have further information on the team which is coached by Professor Richard Gilliam.

What We Have Here:

A Failure To Communicate

Introductory Comment:

Students and faculty talk a great deal around the law school but they seldom discuss serious questions about the philosophy of law and legal education. Part of the reason lies in the tension between student and faculty objectives. One source of this tension is the difficulty of the faculty and students to communicate about the problems which are being discussed in class. To see if I can stimulate a little debate I have attempted to set out a partial explanation for this difficulty.

By A. D. TARLOCK
Assistant Professor of Law

One of the most frustrating experiences a teacher can have is to prepare a set of questions which you think really get to the heart of the problem and then have no one realize what the hell you are talking about. Since this happens with alarming frequency at U.K. and on the assumption that it is not entirely the result of my disorganization, I have set out to try and discover if the problem is common to law teaching generally or stems from Kentucky culture. Since a non-Kentuckian coming south of the Ohio River discovers a world not quite like a Faulkner novel but not like any other place in the country, I have opt for the latter theory and will try to make a few observations about it.

Contrary Values

It appears that the skills attempted to be imparted in law school are directly contrary to the prevailing values in Kentucky. The function of law is to order society by providing a structured method of resolving conflicts. The lawyer's metier is a conflict situation and his mind is prepared to make the hard choices necessary to resolve it. Thus, the lawyer's task is to find the source of the conflict and root out the competing interests, usually financial, and values. He then reasons through to a solution of the conflict. Somebody has to lose and somebody has to win.

One of the tragedies of the U.K. law student is that he gets little reward for the time he spends grinding. His contemporaries across the country may spend less time and perform better in class and on exams because they understand what the case is really about and thus can bluff much better. This approach does not seem to go over very big in Kentucky because few people are so candid to admit that any problems, anywhere, exist.

A World Beyond?

The intellectual style is to avoid discussion of any topics where there may be difference of opinion. As the campus police say, "there has been no report of the incident, therefore, there has been no incident." Nice people just do not disagree with each other about ideas and only the uncouth and outsiders have the nerve to venture the opinion that there might be a better or different world outside Kentucky. Some people don't even believe there is a world outside the Blue Grass.

Problems Smothered

The thinking style seems to be to smother all problems and solve any possible conflicts in values and approaches by reducing the problem to an almost meaningless generality with which most people can readily agree. One never examines the basic values which are at the core of contemporary problems.

Compromise is, of course, necessary to make any social system function but eventually some hard choices have to be made. For example, a state with limited resources such as this one can't make any pretense to having a halfway competent community college system if it continues to place a college in every town that produced a governor or delivered a few more votes in return for a college site.

The lawyer is supposedly being trained to make hard decisions such as these and thus ultimately aid in the more efficient allocation of resources. I would venture the hypothesis that Kentucky's continued race with Mississippi and Arkansas for last place in social services lies impart in the tendency of its leaders to give a little bit to everyone in the hopes that all conflicts will be continually kept out of sight. In the process very little, if anything, happens, as Cash observed in The Mind of the South.

But Whose, Sir?

The most frustrating experience I had this year was to try to make students establish a system to determine when alleged rights would be protected by calling them property. The exercise required the student to make a choice between several relevant but conflicting values. After laying the ground work, I asked a student to make the choice by asking him what should be the goal of the institution of property. He answered, "To protect property rights." But whose, sir?

Along with the refusal to see conflicts, the average Kentuckian has little, if any, ability to solve problems by abstraction. It is almost impossible to teach a problem unless the student can visualize it and its personal relevance made manifest. It is still a bit shocking to hear lawyers disregard precedents because they were decided in another county. The inability to feel at home in the world of concepts and ideas puts the U.K. law student at variance with most of his contemporaries across the nation—at least, north of the Ohio and impedes the application of new concepts to local problems.

The Purpose

The purpose of this piece is intended to be constructive—even if it only forces students to examine their own value systems and either defend or reject them. But beyond this, there are many members of the faculty who would like to work with the students on a more intense intellectual level. However, at present, this is almost impossible because of tensions which exist between many faculty and students over the aim of legal education. Perhaps a first step in the creation of a dialogue is a theory of the source of the tension. There is no question most students have the ability to participate in such a dialogue. The question is do they want to?

News From Around The Law School

Edited By NICK JOHNSON

Phi Alpha Delta

Henry Clay chapter of Phi Alpha Delta held its November dinner meeting at Levas Restaurant with distinguished Professor G. O. W. Mueller speaking on "Criminal Law International."

Jim Brennan, Clerk; Mort Hougland, Treasurer and Ken Alexander have projected plans for several more "P.A.D Coffee Hours" this semester in conjunction with the fraternity's national slogan "Service to the Law Profession."

Phi Delta Phi

Breckinridge Inn of Phi Delta Phi held its first semester initiation on November 9 in the College of Law Courtroon. Following the initiation, a reception and buffet dinner for all members was held at the Catalina Restaurant.

Intramurals

The overall intramural point system standings places BSU in first place with 87 points and the Law School's Judges second with 81 points.

One of the four high ranking law school entries in flag football competition, the Barrister's finished first by defeating BSU but was estopped from claiming the fraternity-independent crown by losing to SAE fraternity.

Point producers for the Judges have been Bill Bowen, second place in Tennis (singles); Eli George, first place and Richard Holt, second place in Golf (singles); Steve Saunders, first place and Ed Glasscock, second place in Handball; and Bill Bowen and Ron Bamberger, first place in Tennis (doubles).

Athletic Committee Co-Chairman Dennis Bradley announced that intramural basketball play has started and that the law school is expected to have several talented entries.

Delta Theta Phi

The Senate of Delta Theta Phi presented a Seminar in the Courtroom on November 9. The seminar, "Defense and Prosecution of A Drunk Driving Case" featured speakers Michard Vimont defense attorney and James Amato, city prosecutor.

Moot Court

The second year members of the Moot Court will be given their problem case for the second semester on registration day in January. The twenty-four winners of Moot Court membership will compete for the four positions on the National Moot Court team.

The Gilliam Club which was called "Nunber Twelve" club until this year has as its first two winners John Adams and Frank Berry.

Vice-President Curtis Quindry will become the President of the Moot Court during the second semester upon the December graduation of John Elias.

LAW ALUMNI NEWS

COMPILED BY JIM COBLIN

Bernard T. Moynohan, Jr., L.L.B. '38, serving as Judge, U.S. District Court for the Eastern District of Kentucky was the honored speaker at the recent dedication of Perry County's new Courthouse facilities at Hazard, Kentucky.

Leslie W. Morris II, L.L.B. '58, and James G. Amato L.L.B. '64, both of Lexington, traveled to New York City to attend the Atlantic Regional Traffic Court Conference at the Fordham University Law School held in July of this year.

Morton C. Nickell, L.L.B. '59, formerly of Ashland, has accepted a position with the FBI and is now stationed in Detroit, Michigan.

Dulaney L. O'Roark, Jr., L.L.B. '60, has been assigned to the Procurement Law Division of the office of Judge Advocate General, U.S. Army, after attending the advance class of The Judge Advocate General's school at the University of Virginia.

Thomas E. Utley, L.L.B. '65, is now associated with the law firm of Smith & Blackburn in the general practice of law with offices in the Goldenberg Building, Somerset.

Charles L. Kirk, J.D. '66, of Maysville has become a member of the law firm of Royse, Zweigart & Kirk with offices in the Cochran Building, Maysville.

James A. Combs, Forrest Chris Gorman John Clarence Ryan Jr., Karl N. Crandall, David E. Klein, Mrs. Laura Larkins Murrell, and Paul Newlin Kiel, J.D.s 1967, have been employed by the Court of Appeals of Kentucky to serve one year terms as law clerks under various Justices and Commissioners.

Braden Conviction Reversed On Appeal

Continued From Page 1

Although no conviction has been sustained under the statutes, they have been used to suppress unpopular speech and individuals, particularly during the "bloody Harlan" days. In part V of the brief, which part was prepared with the assistance of my colleague, Professor Eugene F. Mooney, we demonstrated just how these statutes can and have been used to suppress efforts at political and social change. During the time of the Harlan coal war, "literally scores of criminal syndicalism indictments were issued in Harlan County against ordinary miners, union organizers and interested citizens for political and social activities directed against the coal operators." The book, **Harlan Miners Speak,** details instance after instance of the use of such indictments, **e.g.,** against a shopkeeper who gave the strikers a carload of flour.

The overbroad language of the statutes, particularly KRS 432.040, which was the statute principally involved in the litigation, enabled them to be used in this manner. In part III of the brief I discussed the unconstitutionality of the statutes under the First Amendment (part II discussed federal intervention, and part IV discussed preemption). Among other things the statute prohibits "assembling with a society or assemblage of persons that teaches, advocates or suggests the doctrine of criminal syndicalism."

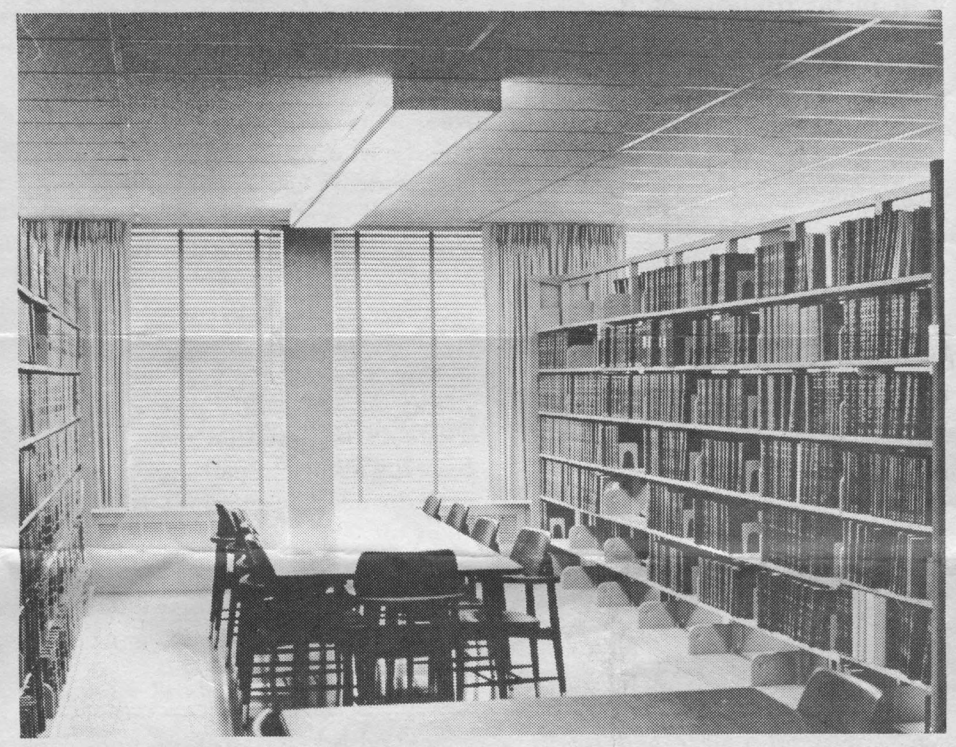
Fifth Annual Review

The mere presence at a meeting of a "subversive" organization would be a violation, and this is clearly unconstitutional, which it has been even since **DeJonge v. Oregon,** decided in 1937! It likewise prohibits membership in an organization that "teaches, advocates or suggests the doctrine of criminal syndicalism or sedition." There is no requirement that the membership be active or even knowing. The statute imposes guilt by association in the fullest sense, and as the Supreme Court observed in **Wieman v. Updegraff,** decided in 1952, "indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power."

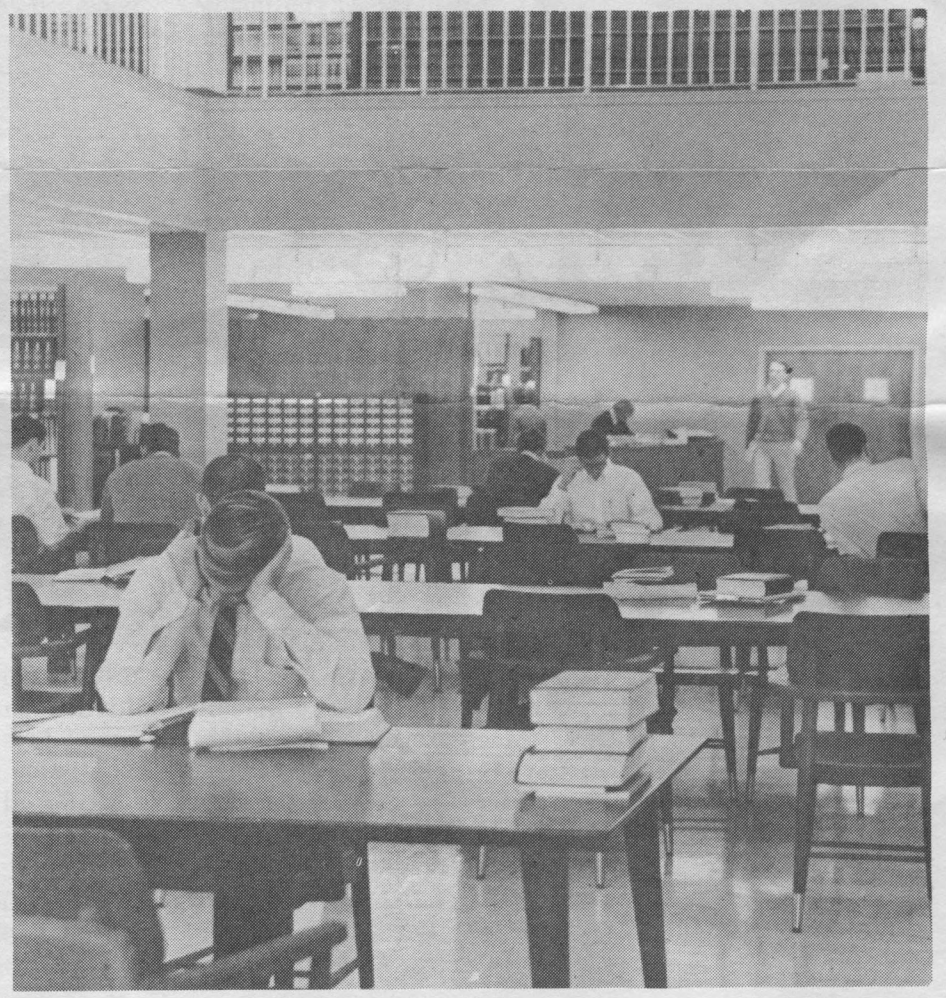
Finally, there is the "circulate and display" clause, which brands as a "seditionist" anyone who "prints, publishes, edits, issues or knowingly circulates, sells, distributes, publicly displays or has in his possession for the purpose of publication or circulation any written or printed matter in any form advocating, suggesting or teaching criminal syndicalism or sedition." As observed in the brief, "There is probably not a library or bookstore in the Commonwealth or perhaps even an educated person who might not be guilty of a violation." Thus, when the statute had been declared unconstitutional, my comment for the press was "While this is a victory for those people who have been indicted under the law, the real victors are all the people of Kentucky, because a law which could be used to suppress free expression was unconstitutional."

With the sedition in McSurely v. Ratliff, hopefully prosecutions for sedition in this Commonwealth are at an end.

The pictures on the front page should bring back some fond memories for old graduates who labored away in the library of Lafferty Hall, the old Law Building. Contrasted with the Lafferty library is the library in the new building which in addition to the central study tables contains many individual carrels. The tri-level library ranks seventh among those in the Southeastern Conference of Law schools.



Located on the main floor, but tucked away in one of the alcoves are more study tables. Each area is individually lighted and provides excellent study space.



Shown here are the main circulation desk, the card catelogs, and the entranceway to the library. The circulation desk has additional space for a vast quantity of reserve material. Besides the study tables and the carrels, the lower floor of the library has rooms where groups of students may confer on legal materials. There are also typing rooms and private spacing for practicing attorneys to research.

This is a view of the main floor of the library taken from the second level. The second level has the legal periodicals and additional sets of the reporters among its many volumes. Also housed on the second floor are foreign reporters and journals.

The Kentucky Commentator

HENRY ROSENTHAL, *Editor*

TIM CONE, *Associate Editor* JIM COBLIN, *Alumni Affairs*

ROBERT VILES, *Faculty Adviser*

Bill Ayer, Jim Brennan, Bob D'Angelo, and Nick Johnson, *Staff Members*

SBA Board of Governors: John McCann, President; Clyde Richardson, Vice President; Kathy Friend, Secretary; Vic Fox, Treasurer; Alan Peck, Third Year Representative; Larry Roberts, Second Year Representative; Andy Winkler, First Year Representative.

Published two times per semester by the Student Bar Association of the University of Kentucky College of Law, Lexington. The Commentator is distributed to the alumni, faculty and students of the College of Law. Editorial offices are in Room 17 of the Law Building. The University extension number is 2611.

Permission is given for reproduction of any article or any part of an article appearing in the Commentator, provided credit is given to both the Commentator and the author if the article is by-lined.